

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LYNN RAY GRIM,

Plaintiff,

vs.

LUCY DUNN, EMPLOYERS
 INSURANCE COMPANY, *et al.*,

Defendants.

3:10-cv-00193-LRH-RAM

ORDER

Plaintiff has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and an application to proceed *in forma pauperis*.

I. Application to Proceed *In Forma Pauperis* (Docket #1)

Before the Court is plaintiff's application to proceed *in forma pauperis*. (Docket #1). Based on the information concerning plaintiff's financial status, the Court finds that plaintiff is not able to pay an initial installment payment towards the full filing fee pursuant to 28 U.S.C. § 1915. Plaintiff will, however, be required to make monthly payments towards the full \$350.00 filing fee when he has funds available.

II. Screening Standard Pursuant to 28 U.S.C. § 1915A

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). *Pro se*

1 pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696,
2 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
3 elements: (1) that a right secured by the Constitution or laws of the United States was violated, and
4 (2) that the alleged violation was committed by a person acting under color of state law. *See West v.*
5 *Atkins*, 487 U.S. 42, 48 (1988).

6 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation
7 Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of
8 poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief
9 may be granted, or seeks monetary relief against a defendant who is immune from such relief." 28
10 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be
11 granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same
12 standard under § 1915 when reviewing the adequacy of a complaint or an amended complaint.
13 When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend
14 the complaint with directions as to curing its deficiencies, unless it is clear from the face of the
15 complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70
16 F.3d. 1103, 1106 (9th Cir. 1995).

17 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*
18 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a
19 claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the
20 claim that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir.
21 1999). In making this determination, the court takes as true all allegations of material fact stated in
22 the complaint, and the court construes them in the light most favorable to the plaintiff. *See Warshaw*
23 *v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to
24 less stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5,
25 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). While the standard under Rule
26 12(b)(6) does not require detailed factual allegations, a plaintiff must provide more than mere labels
27 and conclusions. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). A formulaic
28 recitation of the elements of a cause of action is insufficient. *Id.*, see *Papasan v. Allain*, 478 U.S.

1 265, 286 (1986). Additionally, a reviewing court should “begin by identifying pleadings
2 [allegations] that, because they are no more than mere conclusions, are not entitled to the assumption
3 of truth.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). “While legal conclusions can provide the
4 framework of a complaint, they must be supported with factual allegations.” *Id.*

5 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if
6 the prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on
7 legal conclusions that are untenable (e.g., claims against defendants who are immune from suit or
8 claims of infringement of a legal interest which clearly does not exist), as well as claims based on
9 fanciful factual allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490
10 U.S. 319, 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

11 **III. Complaint Fails to State Claim**

12 Plaintiff, who is incarcerated at the Northern Nevada Correctional Center, brings action
13 against Employers Insurance Company of Nevada and Lucy Dunn, a claims examiner for
14 Employers. Plaintiff alleges that Employer’s Insurance has stopped his disability benefits stemming
15 from a head injury that happened in 1992. (Compl., at pp. 3-4). Based on a letter from Lucy Dunn,
16 which plaintiff filed on May 13, 2010, Employer’s Insurance has stopped his benefit payments based
17 on NRS 616C.440, which provides that an injured employee is not entitled to accrue or be paid any
18 benefits for permanent total disability during the time the injured employee is incarcerated. Plaintiff
19 contends that defendants’ actions constitute an *ex post facto* application of the law, in violation of
20 his rights under the United States Constitution.

21 Private parties are not acting under color of state law. *See Price v. Hawaii*, 939 F.2d 702,
22 707-08 (9th Cir. 1991); *see also Simmons v. Sacramento County Superior Court*, 318 F.3d 1156,
23 1161 (9th Cir. 2003). In the instant case, defendants Employers Insurance Company of Nevada and
24 Lucy Dunn are not state actors, thus precluding a § 1983 action against them alleging a violation of
25 plaintiff’s constitutional rights. Because plaintiff’s allegations fail to state a claim, and amendment
26 would be futile, the complaint is dismissed with prejudice.

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1 **IV. Conclusion**

2 **IT IS THEREFORE ORDERED** that plaintiff's motion for leave to proceed *in forma*
3 *pauperis* without having to prepay the full filing fee (Docket #1) is **GRANTED** and plaintiff shall
4 **NOT** be required to pay an initial installment fee. Nevertheless, the full filing fee shall still be due,
5 pursuant to 28 U.S.C. § 1915, as amended by the Prisoner Litigation Reform Act of 1996. The
6 movant herein is permitted to maintain this action to conclusion without the necessity of prepayment
7 of fees or costs or the giving of security therefor. This order granting *in forma pauperis* status shall
8 not extend to the issuance of subpoenas at government expense.

9 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915, as amended by the
10 Prisoner Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay to the
11 Clerk of the United States District Court, District of Nevada, 20% of the preceding month's deposits
12 to the account of **LYNN RAY GRIM, INMATE #75926** (in months that the account exceeds
13 \$10.00) until the full \$350 filing fee has been paid for this action. The Clerk shall send a copy of
14 this order to the attention of **Albert G. Peralta, Chief of Inmate Services for the Nevada**
15 **Department of Prisons**, P.O. Box 7011, Carson City, NV 89702.

16 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise
17 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the
18 Prisoner Litigation Reform Act of 1996.

19 **IT IS FURTHER ORDERED** that this entire action is **DISMISSED WITH PREJUDICE**
20 for failure to state a claim.

21 **IT IS FURTHER ORDERED** that the Clerk shall enter judgment accordingly.

22 Dated this 17th day of November, 2010.



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26 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE